

# **President Biden’s COVID-19 Action Plan Does Not Impact Pennsylvania Municipalities, But the Times They Are A-Changing**

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On September 9, the Biden Administration announced the “COVID-19 Action Plan” in response to the ongoing nationwide surge of COVID-19 fueled by the Delta variant. Of particular interest to employers, the Plan provides that the Occupational Safety and Health Administration (“OSHA”) is developing a rule which will require all employers with one hundred (100) or more employees to require vaccinations or weekly testing for COVID-19 of all employees. Contemporaneously, President Biden signed executive orders mandating vaccinations for all federal executive branch employees and all employees of federal contractors.

Public sector employers should take note that these requirements apply only to private employers, federal executive branch employees, and federal contractors. Municipalities, even those with over one hundred (100) employees, are not subject to these new federal mandates.

The Plan is part of a growing trend of mandating vaccinations. In May, the Equal Employment Opportunity Commission (“EEOC”) issued revised guidance explicitly stating that federal equal employment opportunity laws do not prohibit employers from requiring that employees physically entering the workplace be vaccinated for COVID-19. Employers of course remain obligated to provide reasonable accommodations to those with disabilities under the ADA or those with sincerely-held religious beliefs under Title VII.

At the time of the EEOC’s update, COVID-19 case numbers were in significant decline and many were anticipating a summer free of significant concern about the pandemic. Beginning in early July, the highly contagious Delta variant caused an acceleration in COVID-19 cases, resulting in a temporary surge in new vaccinations and a renewed interest in mandatory vaccination requirements. On August 23, 2021, the Pfizer-Biotech COVID-19 vaccine became the first COVID-19 vaccine to receive full Food and Drug Administration (“FDA”) approval.

The Biden Administration’s Plan touts the success of vaccine mandates imposed by several large private employers as having resulted in higher vaccinations rates amongst their workforces. The new requirements hope to emulate the success of those programs in private industry and for federal executive branch employees and contractors throughout the country, with the aim of slowing or arresting the COVID-19 surge brought about by the Delta variant.

While not subject to the new requirements, the EEOC’s updated guidance and the full approval of the Pfizer vaccine has made clear that public employers may choose to impose vaccination requirements on non-unionized employees, subject to the employer’s obligation to provide reasonable accommodations for disabilities and sincerely-held religious beliefs. The analysis for unionized employees is more complicated, as the Pennsylvania Labor Relations Board has not yet decided whether a mandatory vaccination requirement is a mandatory subject of bargaining or whether such a policy may be unilaterally adopted by an employer as a managerial prerogative.

A decision on this issue is expected from the Labor Board later this year. Until that time, public employers—even those choosing to mandate vaccinations among their non-unionized

employees—should proceed cautiously. Collective bargaining agreements should be reviewed to determine whether the parties have already bargained the issue of workplace safety standards that may include mandatory vaccinations. Employers can require vaccinations as a condition of employment for new hires who have not yet joined the bargaining unit. Further, if an employer does choose to mandate vaccinations on the theory that doing so is an inherent managerial prerogative, impact bargaining will be required upon demand of the affected unit.

Mandatory vaccination policies, moreover, can take different forms. A mandatory vaccination policy does not necessarily require discipline or termination of employees who remain unvaccinated. Instead, such policies can take the form of “vaccinate or mask-and-test” policies along the federal model. While it will likely take some time for the decisions of the Labor Board to reach a granular level of detail regarding different forms of COVID-19 vaccination policies and whether any particular form is more likely to be a mandatory subject of bargaining or not, policies which provide masking-and-testing alternatives to vaccinations are more likely to survive Labor Board challenge and will be more amenable to an employer’s continuing obligation to provide reasonable accommodations when required by law. Employers should also be prepared to demonstrate a particular need for a vaccine mandate to provide the best chances of surviving a Labor Board challenge.

The attorneys at Campbell Durrant have assisted employers throughout Pennsylvania during these unprecedented challenges and remain available to provide assistance as we move towards the eventual end of this pandemic. Resources are available on our website at [www.cdblaw.com](http://www.cdblaw.com) and we remain directly available to assist you with these issues.